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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re RUDY L., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

RUDY L.,

Defendant and Appellant.

F065214

(Super. Ct. No. 09CEJ600097-2)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Rosendo Peña, Judge.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J., and Franson, J.

The court found appellant, Rudy L., was a person described in Welfare and Institutions Code section 602 after he admitted allegations charging him with possession of marijuana for sale (count 2/Health & Saf. Code, § 11359) and possession of methamphetamine while armed with a firearm (count 4/Health & Saf. Code, § 11370.1, subd. (a)).

On appeal, Rudy contends the court abused its discretion when it found him unsuitable for deferred entry of judgment. We affirm.

FACTS

On March 3, 2011, approximately three months before Rudy's 18th birthday, Fresno police officers, acting on a tip, went to Rudy's house. Rudy answered the door and while speaking with the officers, admitted selling marijuana and having some at the residence. After Rudy's mother allowed the officers in the house, Rudy told them that he had the marijuana and a firearm in a detached garage where he slept. The officers went to the garage and found a small quantity of crystal methamphetamine and two large garbage bags full of marijuana. They also found a loaded Glock pistol, which had been reported stolen, lying on a couch. Rudy told the officers that he bought the gun for \$400 and that he purchased it because of past problems in his neighborhood with Sureño gang members.

Mario S. was at Rudy's residence when the officers arrived. Mario told the officers that he often visited Rudy to smoke marijuana and that he had purchased marijuana from him on several occasions. Rudy and Mario both told the officers that three weeks earlier they had fired the Glock pistol several times in the direction of Chandler Airport. The officers arrested both juveniles.

On March 11, 2011, the district attorney filed a petition charging Rudy with discharging a firearm with gross negligence (count 1/Pen. Code, § 246.3, subd. (a)), possession for sale of marijuana (count 2), possession of a firearm by a minor (count

3/Pen. Code, § 12101, subd. (a)(1)), possession of methamphetamine while armed with a firearm (count 4), and possession of methamphetamine (count 5/Health & Saf. Code, § 11377, subd. (a)). The district attorney also filed a Determination of Eligibility, finding Rudy eligible for deferred entry of judgment (DEJ).

On April 2, 2012, Rudy admitted all the allegations of the petition for purposes of being considered for DEJ.

On May 23, 2012, the probation department filed a DEJ report. The report noted that during an interview with Rudy and his mother on April 16, 2012, Rudy stated that he sold marijuana because he did not have a job. Rudy denied having problems with Sureño gang members or telling the police that. According to Rudy, he had the gun because he just wanted to have one and he thought “it looked cool.” Rudy also claimed the police lied in the police report and in court about what happened the day he was arrested.¹ Nevertheless, he admitted that the charges were true.

Rudy’s mother told the probation department that he obeyed her restrictions and only left the house after obtaining permission. Rudy also performed a variety of household chores and he was respectful and well-behaved at home. Additionally, Rudy’s father spoke to him regularly on the phone and Rudy had gone to visit his father in Washington. Rudy was currently attending an independent study program at Washington Union High School and was scheduled to graduate on May 25, 2012.

Rudy admitted previously drinking alcoholic beverages three times, using methamphetamine twice, and smoking marijuana three times every two weeks starting at age 15. He denied any gang involvement.

¹ Presumably, this was a reference to the testimony of an officer during a hearing on a defense motion to suppress that the court denied.

In January 2009, Rudy and another juvenile stole a teacher's projector from Edison High School. This incident resulted in the court placing Rudy on DEJ from April 17, 2009, through April 17, 2012, and ordering him to serve 30 days on the electronic monitor. On April 19, 2010, DEJ was terminated and the petition was dismissed in that matter.

The report concluded that Rudy was not suitable for deferred entry of judgment because of the seriousness and inappropriateness of the underlying charges in that they involved the possession and discharge of a handgun by a person who was involved in the illegal sales of drugs. The report also cited Rudy's continued use of marijuana through March 2012, even though he had charges pending; Rudy's claim that police were lying about his statements to them when he was arrested; Rudy's failure to reform even though he had been through the program before; and the serious nature and potential for violence of his activities which had escalated dramatically.

On May 23, 2012, when the court noted that the matter was on calendar "for DEJ suitability," Rudy's defense counsel stated that they were submitting on the probation department's recommendation. After the prosecutor also submitted the matter the court stated,

"All right, the Court will adopt the recommendations and findings of the probation officer and find that this minor - - or former minor is not a suitable candidate for [DEJ] in light of the circumstances of the offense, that is the selling of drugs or narcotics while also in possession and use of a handgun.

"The minor has previously completed the [DEJ] program and once again finds himself before the Court on serious alleged offenses. In light of that, the Court agrees that he's not suitable for [DEJ] again...."

The court then allowed Rudy to withdraw his plea.

On June 1, 2012, Rudy entered into a negotiated plea pursuant to which he pled no contest to counts 2 and 4 in exchange for the remaining counts being dismissed.

On June 25, 2012, the court placed Rudy on probation until June 25, 2013, and it ordered him to serve 90 days on the electronic monitor and perform 200 hours of community service.

DISCUSSION

Rudy contends that the following circumstances supported a grant of DEJ: 1) he had not reoffended during the year between his arraignment and his suitability hearing; 2) he was in the process of getting a job; 3) since being released from custody, he attended school regularly, was extremely obedient to the adults in charge of him, had not engaged in any misconduct, and had complied with all the terms and conditions imposed by the court through the date of his suitability hearing; 4) there were no facts indicating he would not benefit from education, rehabilitation, and treatment under a grant of DEJ; and 5) there is nothing about the facts of the instant case indicating a heightened level of criminal sophistication. He further contends that the court was required to make factual findings that demonstrate he was not benefiting from his family and school settings and that in the absence of such finding, the court abused its discretion when it denied him DEJ. Rudy is wrong.

The DEJ procedure allows a minor to admit the allegations of a petition and to complete a period of probation, including participation in programs designated by the juvenile court. (Welf. & Inst. Code, § 794.) If the minor successfully completes the probation, the charges against the minor are dropped and the record is sealed. (Welf. & Inst. Code, § 793, subd. (c).) The first step in the procedure requires the prosecutor to evaluate the minor and determine if the minor is eligible for deferred entry of judgment pursuant to the conditions established in Welfare and Institutions Code section 790, subdivision (a). After performing the evaluation, the prosecutor is required to file a

declaration if the minor is found eligible. (Welf. & Inst. Code, § 790, subd. (b).) The juvenile court is then required to determine if the minor is suitable for deferred entry of judgment. (*Ibid.*)

“The court thus ‘has the ultimate discretion to rule on the suitability of the minor for DEJ after consideration of the factors specified in [California Rules of Court, rule 5.800(d)] and [Welfare and Institutions Code] section 791, subdivision (b), and based upon the “‘standard of whether the minor will derive benefit from “education, treatment, and rehabilitation” rather than a more restrictive commitment. [Citations.]’” [Citations.] The court may grant DEJ to the minor summarily under appropriate circumstances [citation], and if not must conduct a hearing at which “the court *shall* consider the declaration of the prosecuting attorney, any report and recommendations from the probation department, and any other relevant material provided by the child or other interested parties.” [Citations.]’ [Citation.]” (*In re Joshua S.* (2011) 192 Cal.App.4th 670, 677.)

“Although, ... the decision to grant DEJ is a matter of discretion for the juvenile court, appellate courts have concluded that the procedures for considering DEJ reflect a ‘strong preference for rehabilitation of first-time nonviolent juvenile offenders’ and limit the court’s power to deny DEJ such that denial of DEJ to an eligible minor who wants to participate is proper only when the trial court finds “‘the minor would not benefit from education, treatment and rehabilitation.’” [Citations.]” (*In re Joshua S., supra*, 192 Cal.App.4th at pp. 675-676.)

In determining a minor’s suitability for DEJ the court must consider the minor’s age, maturity, educational background, family relationships, demonstrable motivation, treatment history, if any, and other mitigating and aggravating factors. (Welf. & Inst. Code, § 791, subd. (b).) “The court is not required to ultimately grant DEJ, but is required to at least follow specified procedures and exercise discretion to reach a final

determination once the mandatory threshold eligibility determination is made.

[Citation.]” (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123.)

Here, Rudy was three months shy of his 18th birthday when he committed the underlying offenses in this matter. He had previously been placed on deferred entry of judgment for a grand theft offense on April 17, 2009, which was to last through April 17, 2012, but was terminated on April 19, 2010. Despite this previous attempt to rehabilitate him, he committed two drugs offenses while armed with a handgun and he discharged the handgun on at least one occasion in a wantonly reckless manner toward an airport. Moreover, although he admitted to the probation department that he committed the offenses he was charged with, he claimed that the police officers lied about what happened when they arrested him and he continued to use marijuana through March 2012, while awaiting resolution of the underlying charges. Thus, Rudy’s age, his failure to reform after a previous grant of deferred entry of judgment, the seriousness of the current offenses, the escalating nature of his criminal behavior, his contempt for law enforcement, and his continued use of marijuana amply support the court’s determination that he was not suitable for deferred entry of judgment.

Although certain circumstances supported a grant of DEJ, none were so compelling that they undermined the court’s finding of unsuitability. Moreover, we review a court’s denial of DEJ for abuse of discretion. (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 607.) Abuse of discretion implies the absence of arbitrary or capricious disposition, or whimsical thinking. Judicial discretion is abused when a court exceeds the bounds of reason given the circumstances under consideration. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) Therefore, since the juvenile court was aware of its discretion and had sound reasons for its decision, we conclude that the court did not abuse its discretion when it found Rudy unsuitable for DEJ.

DISPOSITION

The judgment is affirmed.